No. 13140

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

HOWELL CHEVROLET COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, et seq.),[1] for enforcement of its order (R. 64–70)[2] issued July 23, 1951, against respondent Howell Chevrolet Company, following the usual proceedings under Section 10 of the Act. The Board's Decision and Order are reported in 95 NLRB No. 62. This Court has jurisdiction under Section 10 (e) of the

[1] The pertinent provisions of the Act are set forth in the Appendix, *infra*.

[2] In the following statement, whenever a semicolon appears, record references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

Act, the unfair labor practices having occurred within this judicial circuit, at respondent's place of business in Glendale, California.[3]

STATEMENT OF THE CASE

I. The Board's findings of fact

The Board's findings that respondent engaged in acts of interference and coercion, refused to bargain with its employees' representative, and discharged an employee because of his union activities, in violation of Section 8 (a) (1), (3), and (5) of the Act, may be summarized as follows:

[3] Respondent, a California corporation, operates an automobile agency and repair and service shop at Glendale, California, as an integral part of the national system of distribution of Chevrolet Motor Division, General Motors Corporation. It is one of a limited number of dealers authorized to sell new Chevrolet motor vehicles, parts, and accessories under a dealers agreement with Chevrolet Motor Division, General Motors Corporation, pursuant to which the latter exercises control over the respondent's capital requirements, place of business, hours, servicing facilities, personnel, signs, and local area advertising (R. 15–16, 55–56; 3, 9, 75–78, 89–90). Chevrolet Division, General Motors Corporation supplies respondent with new cars and trucks from an assembly plant maintained at Van Nuys, California. During the fiscal year ending September 30, 1945, approximately 43 percent of the component parts shipped to said plant were obtained from points located outside the State. During the same year, respondent's purchases from Chevrolet Motor Division, General Motors Corporation exceeded $1,500,000 (R. 16–17; 92–97). It is clear that respondent is engaged in commerce within the meaning of the Act. *N. L. R. B.* v. *Townsend*, 185 F. 2d 378, 382 (C. A. 9), certiorari denied, 341 U. S. 909; *N. L. R. B.* v. *Ken Rose Motors, Inc.*, decided January 21, 1952 (C. A. 1); *N. L. R. B.* v. *Conover Motor Co.*, decided November 5, 1951 (C. A. 10), 29 LRRM 2044, 2045; *N. L. R. B.* v. *Davis Motors, Inc.*, decided November 5, 1951 (C. A. 10), 29 LRRM 2046. Cf. *Williams Motor Co.* v. *N. L. R. B.*, 128 F. 2d 960, 962–964 (C. A. 8).

A. The Union's majority status and request for recognition and a bargaining conference

On January 30, 1950, a number of respondent's employees attended a meeting of the Union[4] and elected Claude Leonard, one of their number, senior chairman or shop steward (R. 20–21; 114–116). By the following day, 15 of the 28 employees in the bargaining unit[5] had designated the Union as their collective bargaining representative (R. 20, 21; 115–130, 161–162, 192–193, 204–205, 216–217, 218–220, 221–222, 224–225, 232–234, 101–102, 90–91, 193–194, 195, 102, 163, 205–206, 218–219).[6] The Union thereupon wrote respondent that a majority of its employees had chosen it as their collective bargaining representative and asked for recognition and a conference to discuss a collective bargaining agreement (R. 21; 214–215). On the same day, January 31, the Union filed a representation petition with the Board (R. 21). The Board subsequently conducted an election on June 1 (R. 12).

B. Respondent's refusal to recognize the Union and efforts to destroy its majority

Respondent admittedly failed to answer the union's letter which it received the next day, February 1 (R. 21, 61; 213–215, 216). Indeed, respondent's president,

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[4] International Association of Machinists, District Lodge No. 727.

[5] The bargain unit found appropriate by the Board consisted of all respondent's employees except supervisors and certain non-operating employees (R. 18; 5, 9).

[6] The Board found that Frank Ogen, foreman of the body shop named in respondent's list of employees working for it on January 31, 1950 (R. 101–102), was a supervisor (see *infra*, pp. 15–17) and therefore not to be considered an "employee" within the bargaining unit (R. 19–22, 57).

its attorney, its service manager, and the foreman of its body shop all acted to bring home to the employees the futility of their supporting the Union and the advantage which would accrue to them if they kept away from it.

1. *Threats of discharge and shut-down by Foreman Ogen and Service Manager Bordeau*

On January 31, the morning following Leonard's election as shop steward at the Union meeting, Leonard and other employees appeared at work wearing Union buttons (R. 21; 120–121, 251). A day or two later, Employee Arnold asked Foreman Ogen "what he thought about the guys going in [the union]," and the foreman replied that "they better watch out for their jobs, because [President] Howell said to fire them all that are wearing buttons" (R. 23, 57; 204–206). Leonard, whose Union button was inscribed "Senior Chairman" (R. 21; 120–121, 189, 251), continued to wear it while at work, and several days later Foreman Ogen told him "to get away" from him "with that button on," because he (Ogen) "didn't want to get fired" (R. 22, 57; 131). When Leonard replied that nobody was going to be fired because of the buttons, Ogen said that President Howell had told him that "he was going to fire anybody that joined the union" (R. 22, 57; 131, 236). Leonard and Kirkland, another employee, later asked Foreman Ogen where he had gotten his information that all the employees who joined the Union were going to be fired, and Ogen repeated that President Howell had told him so the previous night (R. 22–23, 57; 163–164). Ogen made like remarks to Employee Smith who worked in his

department. Several times, some weeks before the Board conducted the election of June 1, he told Smith that any man who joined the Union would be fired, that he himself never had worked in a union shop, never would, and that he would not have any union men working for him (R. 23, 57; 194–196). In addition, during this period, Ogen asked Smith what he "was going to do about the Union," whether he "was in the Union," and if Employee Kirkland had induced him to join (*ibid*). Respondent neither called Foreman Ogen to deny these remarks nor explained his absence (R. 22).

During the same period Service Manager Bordeau told a group of employees that "if the union was defeated, everyone would get a raise" (R. 31, 58; 228–230, 250), and warned Employee Herrick that "If the union went in, Howell would shut his doors" (R. 31, 58; 196–197).

2. Attorney Potruch's announcement of respondent's antiunion position and firm intention not to bargain

About the latter part of March 1950, respondent assembled all its shop employees (R. 23; 270–277). President Howell introduced respondent's attorney, Frederick A. Potruch, to the meeting and told the employees that he would explain respondent's labor relations policies (R. 23–24; 237–238, 271–272, 167, 179–180, 88).

In a lengthy talk Potruch told the employees that respondent did not like "having anyone step in and tell them what to do and what not to do," and intended to challenge the jurisdiction of the Board, fighting the case to its "last dollar" and up to the

Supreme Court, if the Board did not uphold respondent in its position (R. 24, 25, 27, 61, 62; 272–275, 167–168, 172, 180). He further declared that if the Board asserted jurisdiction over respondent, the only way to get an adequate test on the question of jurisdiction would be to go into the Circuit Court of Appeals and that:

> It might even necessitate * * * that for any company, not necessarily Howell, to get a case into the United States Circuit Court of Appeals, it might be necessary to do something to be cited for an unfair act under the National Labor Relations Act; that someone might have to be discharged, either on a friendly basis or even deliberately and then the charge brought * * * (R. 25, 58; 274).

Potruch also stated that the employees did not need a union since this was a small establishment; that the employees would never get a union contract from Howell; that the employees would have to go out on strike to obtain a contract; and that respondent could not make any change in wages or other working conditions unless it consulted the Union, but "by God the Company wouldn't do that." (R. 25–26, 56, 58; 167–168, 180; 175–176; 183.) Potruch added that if he were an employee with any problems he would go to the employer individually and work them out with him personally (R. 27, 62; 277–278). However, he pointed out, the employees "had gone too far" to be free to speak for themselves any more, for they had voluntarily selected somebody to represent them and "do all their talking for them at any time they wanted to" (R. 62; 277–278). Potruch also made it plain to the employees that even if the Union, already

so chosen by the employees, won the election, respondent still would refuse to bargain with it and might employ such refusal as a way to obtain a court test of the Board's jurisdiction under the Act (R. 26–27, 56, 58; 185, 171–172).

Potruch again visited the plant about two weeks before June 1, the election date (R. 28; 200–201). On this occasion, while talking about the election, he told a group of employees that "There would be a new deal after the first of the month" (R. 59; 201).

3. President Howell's promises of pay increases and solicitation of employee rejection of the Union

During the two week period before the election, President Howell told Employee Skelton that "If the union was defeated, why, everybody would get a raise" (R. 30, 58; 226–228). Similarly, Howell promised Employee Hansen to see to it that he "got a raise in time" if Hanson voted "in favor of the plant" (R. 30, 57; 209–210, 212). To Employee Smith, Howell said, "He didn't want the National Labor Relations Board in there to tell him how to run his business" adding that if the Union should be defeated at the election respondent would raise his commissions as a body man from 40 to 50 percent[7] (R. 30, 58; 197–199, 201–202).

C. Respondent's discharge of Union Steward Leonard

1. Leonard's long and varied experience

At the time of his discharge on March 31, 1950, Leonard had 25 years experience as an all around

[7] Howell later kept his promise. Three or four days after the Union lost the election, Howell at a company banquet given all the employees, announced a general wage increase which included a raise in commissions. Bodymen were raised to 50 percent and mechanics to 45 percent (R. 31; 242–244).

mechanic (R. 38; 102–107, 109). He was a certified and approved Chevrolet mechanic and had received the General Motors Diploma for nine successive years after completing courses of instruction in Chevrolet mechanics and repair (R. 38–39; 110–114). He received his eighth annual diploma while still in respondent's employ and his ninth about a month after his discharge (R. 39; 111–113). He had also operated his own automobile repair shop for three years between 1929 to 1933 (R. 39; 104–106). Although Leonard was engaged in brake adjustment work at the time of his discharge, his experience both in and out of respondent's employ included front end work (R. 39; 103, 107, 108, 109, 152–156) as well as the overhauling and repair of motors, transmissions, and rear ends, grinding valves, and other types of mechanical work performed in a general garage (R. 39; 103–104, 107, 108, 109).

Respondent employed Leonard twice. In 1944, he came in as a line mechanic. His broad duties as such required him, in addition to doing front end work, to overhaul motors and transmissions, do rear end work, and reline and adjust brakes (R. 39; 106–107). After Leonard had been with respondent for a little over a year, respondent's service manager opened his own repair shop and took Leonard with him to work as a general mechanic (*ibid.*).

In January 1948, respondent employed Leonard again, this time as a brake repairman (R. 39; 109). Although he regularly relined and adjusted brakes, overhauled and repaired wheel and master cylinders and made other repairs on the brake system (R. 39;

109) he also had repeated occasion to do front end work as well as other types of work during busy periods (R. 39; 151–153). Thus, during two weeks in August 1949, when the regular front end man was on vacation, and also when he was away for some days at other times on account of sickness, Leonard performed the latter's front end work in addition to his own regular duties (R. 39–40; 109–110, 152–158).

2. Leonard's outstanding union activity and respondent's threats of discharge for supporting the Union

Leonard joined the Union on January 23, being the first man in the shop to do so (R. 20, 40; 114). He was elected senior chairman or shop steward on January 30, and respondent admittedly noted that he began wearing his "senior chairman" button to work the following day (R. 20–21, 40; 115, 120–121, 249–251). As leader of the Union's organizational drive, he openly solicited and obtained many new union supporters (R. 40; 121–124, 125–129, 220–223, 256, 291, 293, 294, 297–298, 301–302). As we have seen (*supra,* p. 4), about a week after Leonard first wore his button to work, Body Shop Foreman Ogen warned Leonard "To get away from him with that button on" as "he did not want to get fired" and stated also that President Howell told him (Ogen) that he was "going to fire anybody that joined the Union." During the same week and while Kirkland was also wearing a Union membership button, Foreman Ogen repeated to him and to Leonard that President Howell had said that he intended to discharge all members of the Union (*supra,* p. 4).

3. Respondent's discharge of Leonard, allegedly for economic reasons

Leonard derived his earnings solely from commissions received for work done for specific customers (R. 40–41; 131, 134, 139). During the month prior to January 31, his bi-weekly net earnings after deductions for withholding tax, social security, and the like amounted to about $150 (R. 41; 135–137). In the beginning of the following month, however, and coincidentally with the manifestation of Leonard's leadership in the Union, Service Manager Bordeau began assigning work normally assigned to Leonard to the men who worked on the lubrication rack, one of whom was Bordeau's son (R. 41; 139–148, 164–167, 178–179). Reflecting this diversion of available work, Leonard's bi-weekly net earnings fell substantially (R. 41; 135–136).[8] On March 21, and just after Leonard had finished working overtime, Bordeau discharged him. He told Leonard that there was not enough work for the brakeman and the front end man to each make a living and that respondent had decided to combine front end and brake jobs and keep in its employ only Herrick, the front end man (R. 41; 137–138). Respondent has advanced no other reason for the discharge (R. 42). Leonard protested that he had more seniority than Herrick and that he also could perform front end work. Bordeau replied, however, "that is the way it is to be and he could do nothing further about it" (*ibid.*).

[8] Leonard's bi-weekly net earnings were $98.27 as of February 15, $45.52 as of February 28, $69.30 as of March 15, and $87.22 as of March 31.

In the two-month period after Leonard's discharge, and before the election (*supra,* p. 3), respondent admittedly had "a busy season" (R. 266). Herrick's earnings nearly doubled and he found it necessary to call in an outside worker about 4 times in order to help get his job done (R. 42; 266, 255–256, 264–265, 182, 188–189, 248–249). Service Manager Bordeau testified that he did not recall Leonard to help Herrick, instead of allowing Herrick to obtain strange help, because he did not know where to reach Leonard (R. 42–43; 266). However, Leonard had visited respondent's establishment several times during this period (R. 43; 149–150). Moreover, President Howell himself saw Leonard there and once personally ordered him off the premises (R. 43; 150). Bordeau also testified that Leonard could not do front end work and had indicated that he would not be interested in the combined brake and front end job because "some time in 1949" he had refused to do certain front end alignment work (R. 43; 267–268). Leonard, who had frequently done front end work for respondent (*supra,* pp. 8–9), had refused to do the particular front end alignment work when Bordeau had requested it only because he was actually working on another job at the time and was unable to undertake the extra work in addition (R. 43; 302, 148–149).

II. The Board's conclusions

On the basis of the foregoing facts, and upon the whole record, the Board concluded that respondent, in violation of Section 8 (a) (1) of the Act, interfered

with, restrained and coerced its employees by threats of discharge of union supporters; by threats of a plant shutdown if the Union won the Board-conducted election; by promises of pay increases if the Union were defeated; by interrogation as to employee Union membership and activity; and by announcing that it would not bargain with the Union and would never recognize or contract with it (R. 56–59).

The Board also found that respondent discharged Leonard in violation of Section 8 (a) (3) of the Act because of his Union membership and activities (R. 59–60). The Board rejected respondent's contentions that it discharged Leonard because of economic reasons and that it had selected him for dismissal because he was not qualified to do front end work and had indicated a lack of interest in it (R. 43).

The Board further concluded that on or after February 1, 1950, respondent failed to bargain with the Union, in violation of Section 8 (a) (5) of the Act (R. 60–61, 37–38). The Board found that respondent in refusing to recognize and bargain with the Union, was not motivated by any good faith doubt of the Union's majority in an appropriate bargaining unit, but solely by a desire to gain time in which to destroy the Union's majority and also by a rejection of the collective bargaining principle (R. 61–62, 33–38).

III. The Board's order

The Board's order (R. 64–70) requires respondent to cease and desist from the unfair labor practices found. As affirmative action, the order requires re-

spondent, upon request, to bargain collectively with the Union, offer reinstatement with back pay to Employee Leonard, make available to the Board, upon request, its records necessary to analyze the amount of back pay due and the right of reinstatement under the terms of its order, and post the usual notices.[9]

ARGUMENT

I

Substantial evidence supports the Board's finding that respondent interfered with, restrained and coerced its employees in violation of Section 8 (a) (1) of the Act

Respondent's reaction to its employees' exhibition of interest in the Union was an outright counter-offensive of elementally unlawful interference, restraint and coercion, conducted by its president, service manager, body shop foreman, and attorney (*supra,* pp. 4–7).

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[9] The Board dismissed the complaint insofar as it alleged that respondent also violated Section 8 (a) (4) of the Act in discharging Leonard (R. 67). The Board found that Attorney Potruch's statements to respondent's employees that respondent would contest the Board's jurisdiction, while not violative of Section 8 (a) (1) of the Act, were calculated to impress upon the employees the futility of voting for the Union in the election. The Board found in addition that by these remarks, as well as by its conduct in violation of Section 8 (a) (1) and (3), respondent created an atmosphere incompatible with the employees' freedom of choice in their selection of a bargaining representative and thus interfered with the election (R. 63). Further finding no actual good faith doubt of the Union's majority on respondent's part and therefore no existing question affecting representation, the Board concluded that the election should be regarded as a nullity. The Board therefore dismissed the petition in the representation case which had been consolidated with this proceeding (R. 63, 67).

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Thus, through Foreman Ogen, respondent threatened that it would dismiss union supporters (*supra,* pp. 4–5). Through Attorney Potruch, respondent elaborately brought home to its employees the possibility that, as a tactic in its envisioned fight "to the last dollar," against submitting to the collective bargaining requirements of the Act, respondent might find it "necessary to do something to be cited for an unfair act," "someone might have to be discharged * * * deliberately" as a means of making a case in order to bring the matter of the Board's jurisdiction squarely before the courts (*supra,* p. 6).[10] Through Service Manager Bordeau respondent threatened that it would shut down its operations rather than bargain with the Union (*supra,* p. 5),[11] and Attorney Potruch declared that, in any event, it would not recognize the Union or contract with it unless its employees could succeed in forcing it to do so through resort to a strike (*supra,* p. 6).[12] Balancing the threats of reprisal with promises of benefit, President Howell offered to increase the employee commission rate in

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[10] *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518; *Texas Co.* v. *N. L. R. B.*, 135 F. 2d 562, 563 (C. A. 9); *N. L. R. B.* v. *Polson Logging Co.*, 136 F. 2d 314 (C. A. 9); *N. L. R. B.* v. *Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C. A. 9); *N. L. R. B.* v. *Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 833 (C. A. 9).

[11] *N. L. R. B.* v. *Polson Logging Co.*, 136 F. 2d 314 (C. A. 9); *N. L. R. B.* v. *Long Lake Lumber Co.*, 138 F. 2d 363, 364 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 246, 247 (C. A. 9).

[12] See *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 245, 246, 247 (C. A. 9). See also, *N. L. R. B.* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 337.

return for defeat of the Union in the scheduled election (*supra,* p. 7),[13] and Service Manager Bordeau declared that "everyone would get a raise" (*supra,* p. 5). Finally, through Foreman Ogen, respondent engaged in extensive interrogation of its employees about their union sympathies and activities (*supra,* p. 5), action which is coercive in itself[14] and, in a context of blatant antiunionism, is doubly so.[15]

Respondent's contention before the Board, that it was not responsible for Foreman Ogen's antiunion activities because Ogen was not really a supervisory employee was properly rejected (R. 57, n. 5). The record leaves no question but that Ogen was foreman of the body shop and thus part of management. When President Howell was asked at the hearing to describe the Company's operations he testified (R. 89): "We have a new car sales room, a parts department, a service department, lubrication department, body shop * * *." Describing the management of these departments, President Howell testified (R. 90): "We operate with a sales manager of new cars, a parts manager in charge of the parts department, a service manager in charge of the

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[13] *Medo Photo Supply Corp.* v. *N. L. R. B.*, 321 U. S. 678, 684; *N. L. R. B.* v. *Fitzpatrick & Weller, Inc.*, 138 F. 2d 697, 699 (C. A. 2); *N. L. R. B.* v. *Ford*, 170 F. 2d 735 738 (C. A. 6); *M. H. Ritzwoller Co.*, v. *N. L. R. B.*, 114 F. 2d 432, 435 (C. A. 7).

[14] *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732, 743 (C. A. D. C.), certiorari denied, 341 U. S. 914.

[15] *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 518; *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 585, 590 (C. A. 9); *N. L. R. B.* v. *Lettie Lee, Inc.*, 140 F. 2d 243, 245 (C. A. 9); *N. L. R. B.* v. *Holtville Ice & Cold Storage Co.*, 148 F. 2d 168, 169–170 (C. A. 9).

service department with a body shop foreman under his jurisdiction, and a used car manager." Howell then named Frank Ogen as the body shop foreman (R. 90–91).[16] As the Board noted (R. 57, n. 5), Employee Smith, who did body and fender work, testified that Ogen was his foreman and that Ogen had told him "He wouldn't have any union man working under him" (R. 193–194). Employee Arnold, also a body and fender worker, likewise testified that Ogen was his foreman (R. 204, 206), as did Employees Kirkland and Leonard (R. 131, 163). The Board pointed out (R. 57, n. 5) that although "it was clear at the hearing that the General Counsel was seeking to attribute to the respondent various [unlawful] acts of interference * * * by virtue of Ogen's supervisory status * * * Respondent did not contend that Ogen was not a supervisor or come forward with evidence to rebut the testimony indicating that Ogen was a supervisor."

There is no basis therefore for regarding Ogen's supervisory status as being any different than that which ordinarily attaches to the familiar term "foreman." Ogen did not testify (R. 22, n. 12), and certainly respondent's bare unsupported statement, made in its briefs to the Board and trial examiner after the close of the hearing, that Ogen was not a supervisory employee, does not offset the contrary evidence referred to above. We submit that the Board correctly concluded (R. 57, n. 5), as had the trial examiner

[16] Ogen's name is misprinted "Frank Hogan" at R. 90, but correctly printed "Frank Ogen" at R. 91.

(R. 19, 22, n. 12), that "In the light of the entire record * * *. * * * Ogen was a supervisor within the meaning of the Act and * * * his conduct was attributable to the Respondent."[17] *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 79, 81; *N. L. R. B.* v. *Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 833 (C. A. 9); *Ohio Power Co.* v. *N. L. R. B.*, 176 F. 2d 385 (C. A. 6), certiorari denied, 338 U. S. 899.

II

Substantial evidence supports the Board's finding that respondent refused to bargain with the Union, in violation of Section 8 (a) (5) and (1) of the Act

A. The Union represented a majority of the employees in an appropriate unit

The Board found that at the time of the refusal to bargain on February 1, 1950, the Union had been designated as their bargaining representative by a

[17] Apart from Foreman Ogen's conduct, the concurrent anti-union activities of respondent's president, its service manager, and its attorney (*supra*, pp. 4–7), fully support the Board's conclusion and order relating to unlawful interference and coercion (R. 56–58, 65). Respondent's contention that Foreman Ogen's acts of interference were, in any event "isolated" is manifestly without basis. Indeed, in light of the similarity between Foreman Ogen's antiunion activities and those of the three unquestioned representatives of management, it is fair to say that, regardless of Ogen's actual supervisory status "respondent's employees had just cause to believe that [he was] acting for and on behalf of respondent and that respondent was responsible for [his] activities." *N. L. R. B.* v. *Germain Seed Co.*, 134 F. 2d 94, 99 (C. A. 9), and cases there cited: *N. L. R. B.* v. *Security Warehouse & Cold Storage Co.*, 136 F. 2d 829, 833 (C. A. 9). Cf. *N. L. R. B.* v. *Fred P. Weissman Co.*, 170 F. 2d 952, 954 (C. A. 6), certiorari denied, 336 U. S. 972.

majority of the employees in an appropriate bargaining unit (R. 18–20, 55, 60–62). While respondent does not question the correctness of the Board's unit determination (R. 5, 9),[18] it challenges, as unsupported, the finding with respect to the Union's majority.

The Board found, on the basis of a list prepared by respondent that there were 28 employees in the unit (R. 19; 101–102, 234–235). Of these, 14 had signed Union designation cards on or before January 31 (R. 20; 117–118, 119–120, 122–125, 127, 130, 162, 205, 216–219, 222–225, 233–234) and one (Employee Leonard) testified that he had joined the Union on January 23 (R. 20; 115). Accordingly, the Board found that at the critical time in question the Union had been designated bargaining representative by a majority of 15 out of the 28 employees in the unit (R. 20).

Respondent's claim that the Union's majority was not proved is based solely on its contention that the signature on Employee Malstrom's designation card was not properly identified when the card was received in evidence (R. 129).[19] Upon the undisputed facts relating to the circumstances of Malstrom's signing of the card, we submit, this objection is

[18] The Board found that the appropriate bargaining unit consisted of all of respondent's employees, excluding supervisors, salesmen, office and clerical employees, professional employees, and guards (R. 18).

[19] The claim that Foreman Ogen was not a supervisory employee and therefore should have been included in the unit is immaterial. Increasing the number of employees in the unit to 29, by including Ogen, would not have affected the Union's majority of 15 employees.

patently frivolous. On the morning of January 31, at the same time Shop Steward Leonard gave Employee Sciolora a card and asked him to sign and return it, he gave a card to Malstrom (R. 126, 128). A little while later the same morning both Sciolora and Malstrom handed the signed cards back to Leonard (R. 126, 128–129). Sciolora testified that he had signed his card (R. 298). In these circumstances, the fact that Malstrom was not called to testify at all, and that his signature on the card was never formally identified, affords no basis for attacking the Board's finding that he, as well as Sciolora, designated the Union as his bargaining representative. The very fact that he promptly returned the card to the shop steward with his name written on it warrants the inference that the signature was his own. And even apart from this, Malstrom's action in returning the card bearing his ostensible signature clearly evidenced his intent to have the Union represent him. The Act "requires no specific form of authority to bargain collectively * * * Authority may be given by action as well as in words * * * not form, but intent, is the essential thing * * * It is only necessary that it be manifested in some manner capable of proof, whether by behavior or language." *Lebanon Steel Foundary Co.* v. *N. L. R. B.,* 130 F. 2d 404, 407 (C. A. D. C.).[20]

[20] It was not necessary that Malstrom should have signed the card. If he did not actually sign it, it is clear that he adopted the signature as he had full power to do. Wigmore, *Evidence*, 3d Ed., Sec. 2134; *Restatement of the Law of Agency*, Secs. 17, 20, 82, 84. *Brezner Tanning Co.*, 50 N. L. R. B. 894, 904, enforced, 141 F. 2d 62 (C. A. 1).

B. Respondent's unlawful refusal to bargain

Since the Union had been duly designated as their bargaining representative by a majority of respondent's employees, it follows that respondent's conceded refusal to bargain with the Union (*supra,* pp. 3–7), unless excused by other circumstances, was in violation of Section 8 (a) (5) of the Act as the Board found (R. 60–62). The only defenses suggested by respondent are that it doubted that its operations were subject to the Board's jurisdiction, and doubted that the Union actually represented a majority of its employees (R. 61–62). These, we submit, the Board properly rejected (*ibid.*).

It goes without saying, we believe, that respondent's doubt as to the Board's jurisdiction is immaterial to the question of respondent's responsibility for its conduct. Respondent's unquestioned right to litigate the jurisdictional issue did not include a license to violate the statute. *N. L. R. B.* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 42–43; *May Department Stores Co.* v. *N. L. R. B.,* 326 U. S. 376, 388–392.

With respect to the contention that respondent refused to recognize the Union because it doubted the Union's majority, the record conclusively supports the Board's finding to the contrary (R. 61–62).[21]

[21] The Board recognizes, of course, that an employer may refuse recognition and insist upon an election when he actually has an honest doubt as to the union's majority status. *W. T. Grant Company*, 94 NLRB No. 145, pending in this Court on Board's petition for enforcement, No. 13133; *Sport Specialty Shoemakers, Inc.,* 77 NLRB 1011, 1012–1013; *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914.

As we have seen (*supra,* pp. 4–7), respondent did not merely refuse the Union's request for recognition and bargaining, but deliberately undertook a campaign of coercive unfair labor practices in order to eliminate any obligation to bargain by destroying the Union's support. Thus respondent questioned employees concerning their union membership and activity, threatened to discharge Union supporters, promised rewards to employees who would reject the Union, declared that it would never bargain or contract with the Union unless forced by a strike to do so (*supra,* pp. 4–7), and giving substance to its earlier threats finally discharged Shop Steward Leonard because of his Union activity, (*supra,* pp. 7–11; *infra,* pp. 22–25). In addition to all this respondent made clear that it had no qualms about risking a violation of the Act, when it declared that it would in fact do so deliberately, if necessary, in order to provide a case to test in the courts the issue of the Board's jurisdiction (*supra,* p. 6).

In our view, it would be difficult to conceive a case that would afford more compelling evidentiary support for a finding that the employer, in refusing to bargain, was not acting from a good faith doubt of the union's majority.[22] The Board could scarcely

[22] The Board noted also that Attorney Potruch in his remarks to the employees in the spring of 1950, indicated a realization of the Union's majority support, when he reproached them for affiliating with the Union, but said that they "had gone too far" at that point "to do [their] own talking; that they had selected voluntarily somebody to represent them and that person would do all their talking for them at any time they wanted to" (R.

have concluded otherwise than that respondent's "refusal to recognize the Union on February 1, 1950, and thereafter, was motivated by a desire to gain time in which to destroy the Union's majority, and by a rejection of the collective-bargaining principle" (R. 62). Cf. *N. L. R. B.* v. *Biles-Coleman Lumber Co.*, 98 F. 2d 18, 22 (C. A. 9); *Joy Silk Mills, Inc.* v. *N. L. R. B.*, 185 F. 2d 732, 741 (C. A. D. C.), certiorari denied, 341 U. S. 914; *N. L. R. B.* v. *Star Beef Co.*, decided December 15, 1951 (C. A. 1), 29 LRRM 2190, 2194; *N. L. R. B.* v. *Everett Van Kleeck & Co., Inc.*, 189 F. 2d 516 (C. A. 2).

III

Substantial evidence supports the Board's finding that respondent discharged Employee Leonard because of his activities in behalf of the Union, in violation of Section 8 (a) (3) and (1) of the Act

As shown in the statement of facts (*supra*, pp. 3–11), Leonard, the leading Union advocate among respondent's employees, joined the Union at the outset of its organizing campaign and was elected shop steward on January 30. Two months later he was discharged allegedly for economic reasons, which the

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62; 270–271, 277–278). The Board and trial examiner, crediting the contrary testimony of other witnesses (R. 33–37, 55; 305–310), did not credit Potruch's testimony that he stated at an informal meeting of Board and Union representatives, held in February and relating to another case, that he did not believe the Union had a majority (R. 37; 304–305). The question of the Union's proof of its majority never arose. At the February meeting referred to, the parties did not even discuss the Howell case (R. 35–36; 305–309). Cf. *N. L. R. B.* v. *State Center Warehouse Co.*, decided November 27, 1951 (C. A. 9), 29 LRRM 2209, 2210.

Board found to be a patently manufactured pretext. During that two month interval respondent engaged in an outright campaign of particularly coercive unfair labor practices, including threats of discharge and promises of reward, all designed to destroy the Union's majority and eliminate respondent's statutory obligation to bargain with it. Not only were threats of discharge made to the employees generally, but when Foreman Ogen saw Leonard wearing his Union button in the shop he warned Leonard to "get away from him with that button on" because "he didn't want to get fired," and added that President Howell had said that he was going to fire anyone who joined the Union. In addition to this familar type of threat, respondent made the extraordinary declaration to its employees that it might find it necessary to discharge an employee in violation of the Act in order to provide a test case on the question of the Board's jurisdiction.

When against this background of open antiunionism respondent discharged Leonard for a stated reason which "did not stand up under scrutiny" (*N. L. R. B.* v. *J. G. Boswell Co.,* 136 F. 2d 585, 595 (C. A. 9)), the conclusion that respondent's threats were prophetic, and the discharge simply a facet of respondent's attack upon the Union, was little short of inevitable.

As the Board found, soon after Leonard assumed leadership of the Union's campaign respondent began to divert the brake adjustment work customarily done by Leonard to other employees who regularly

operated the lubrication rack, a different type of work. Then, citing Leonard's reduced earnings, respondent declared that since there was not enough work for both the brake man and the front end man to earn a living, it had decided to combine the two jobs into one and give it to Herrick, the front end man, who had less seniority than Leonard. When Leonard protested against this departure from seniority and declared that he could also do front end work, Service Manager Bordeau offered no explanation, but simply said "that is the way it is to be" (*supra,* p. 11).

Respondent contended before the Board that it did not consider Leonard qualified to do front end work or interested in handling it, claiming that he had at times refused requests to do such work (*supra,* p. 11). But the contention is baseless. The record shows that Leonard was not only an all around able mechanic with 25 years of experience, but that he had repeatedly done front end work for respondent as well as for other employers. Moreover, on the occasions referred to by respondent, the only reason Leonard had turned down the front end work offered to him was that he was too busy with other work to handle it. And at the time of his discharge, as we have seen, Leonard expressly declared his willingness and capacity to do front end work.

If more were needed to demonstrate that respondent's discharge of Leonard was not based upon economic necessity, it is revealed in the fact that soon after his discharge Herrick's earnings at the combined job nearly doubled (*supra,* p. 11). More-

over, when Herrick on three or four occasions needed extra help to handle the work, respondent did not recall Leonard but employed outside help. Respondent's claim that it did so because it did not know how to reach Leonard was reasonably rejected by the Board since, during the period in question, Leonard visited the shop several times, and on one such occasion was even ordered off the premises by President Howell.

We submit that the evidence in support of the Board's finding that Leonard was discharged because of his activity in behalf of the Union, and in violation of Section 8 (a) (3) of the Act, is more than sufficient.

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence, that its order is valid and proper, and that a decree should issue enforcing the order in full.

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JANUARY 1952.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. IV, Secs. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee * * * but shall not include * * * or any individual having the status of an independent contractor, * * *

* * * * *

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the

right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person

from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such

temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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